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SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

73-478

October Term, 1973.

ABRAHAM E. FREEDMAN,

Petitioner,

v.

JAMES M. MORRISSEY, JOSEPH PADILLA, and RALPH IBRAHIM, Individually and on Behalf of the Members of the NATIONAL MARITIME UNION OF AMERICA,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

MARVIN I. BARISH,
WILFRED R. LORRY,
8th Floor Lafayette Bldg.,
5th & Chestnut Sts.,
Philadelphia, Pa. 19106
Attorneys for Petitioner.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

INDEX TO APPENDIX.

	Page
District Court Opinion (June 29, 1972)	A1
District Court Opinion (October 26, 1972)	A17
Court of Appeals Opinion	A35
Agreement Between NMU and Perry Dated August 2, 1966 ..	A46
Agreement and Declaration of Trust Between NMU and Cooper, et al. Dated December 29, 1952	A50

Appendix.

DISTRICT COURT OPINION, JUNE 29, 1972.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

69 CIV. 442.

JAMES M. MORRISSEY, JOSEPH PADILLA, RALPH IBRAHIM, INDIVIDUALLY AND ON BEHALF OF THE MEMBERS OF THE NATIONAL MARITIME UNION OF AMERICA,

Plaintiffs,

—against—

JOSEPH CURRAN, SHANNON WALL, WILLIAM PERRY, MARTIN SEGAL, ABRAHAM E. FREEDMAN AND LEON KARCHMER,

Defendants.

Appearances:

DUER & TAYLOR,
74 Trinity Place, New York, N. Y. 10006
Attorneys for Plaintiffs,

ARTHUR E. MCINERNEY, Of Counsel.

BLOOM AND EPSTEIN,
110 East 42nd St., New York, N. Y. 10017
Attorneys for Defendants Curran, Wall and Freedman,

HAROLD EPSTEIN,
ROBERT MILNER, AND
WARREN PESETSKY, Of Counsel.

SIMPSON THACHER & BARTLETT,
One Battery Park Plaza, New York, N. Y. 10004
Attorneys for Defendant Segal,

ROY L. REARDON,
MELVYN L. CANTOR AND
JOHN W. OHLIVEILER, Of Counsel.

SURREY, KARASIK, MORSE AND SEHAM,
500 Fifth Avenue, New York, N. Y. 10036
Attorneys for Defendant Karchmer,

HERMAN E. COOPER AND
CARL F. GOODMAN, Of Counsel.

MEMORANDUM.

BONSAL, *D. J.*

In the earlier proceedings in this action it has been determined that the 1960 constitution of the National Maritime Union of America ("NMU") did not authorize the inclusion of non-officers of NMU in the NMU Officers Pension Plan ("the Pension Plan"), and that NMU was entitled to recover from the Trustees of the Penson Plan all amounts paid by NMU into the Pension Plan for the account of non-officers, plus interest. *Morrissey v. Curran,* 302 F. Supp. 32 (S. D. N. Y. 1969), *aff'd in part, rev'd in part,* 423 F. 2d 393 (2d Cir.), *cert. denied,* 399 U. S. 928 (1970), 400 U. S. 826 (1970), *on remand,* 336 F. Supp. 1107 (S. D. N. Y. 1972). Accordingly, on February 18, 1972, judgment was entered in favor of NMU against the Pension

Plan in the amount of $674,222.60 (presenting $520,283.38 paid into the Pension Plan for the account of non-officers, plus interest in the amount of $153,939.22), which judgment has been paid. Judgment was also entered on February 18, 1972 in favor of the Pension Plan against the defendant William Perry ("Perry") a non-officer, in the principal amount of $222,200. (the amount of the lump sum pension paid to him), plus interest in the amount of $41,107., or a total of $263,307. This judgment has not been paid. The court has been advised that the Pension Plan has instituted supplementary proceedings to collect the judgment.

Plaintiffs now seek to surcharge the defendants Curran and Wall, officers of NMU, and defendants Segal, Freedman and Karchmer, Trustees of the Pension Plan, with respect to amounts paid by the Pension Plan to non-officers of NMU.

In its Memorandum filed January 11, 1972, the court stated that the plaintiffs may "notice a hearing to determine the personal liability, if any, of the defendant trustees (of the Pension Plan), Freedman, Segal and Karchmer, and officers [of NMU], Curran and Wall, to NMU for the monies which the Pension Plan has paid out to non-officers and which it is unable to recoup." (336 F. Supp. at 1111). The hearing was held on April 13, 14 and May 1, 1972, at which plaintiffs presented their evidence. At the conclusion of the hearing, the defendants moved to dismiss, pursuant to Rule 41(b), F. R. Civ. P., on the ground that plaintiffs have shown no right to relief.

Plaintiffs are members of NMU, suing on behalf of all of its members under Section 501 of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U. S. C. § 501. Defendant Joseph Curran ("Curran") is the President of NMU. Defendant Shannon Wall ("Wall") is the Secretary-Treasurer of NMU. Defendants Martin

Segal ("Segal"), Abraham E. Freedman ("Freedman") and Leon Karchmer ("Karchmer") are the Trustees of the Pension Plan pursuant to an Agreement and Declaration of Trust of December 29, 1952 as subsequently amended. Freedman is also General Counsel of NMU.

Perry was Assistant to the President of NMU, and in prior proceedings it has been determined that he was not an officer of NMU entitled to participate in the Pension Plan. (302 F. Supp. 32, as affirmed by the Court of Appeals, 423 F. 2d 393.) While there were several other non-officers who received payments under the Pension Plan,[1] the evidence offered by plaintiffs at the hearing primarily concerned Perry. The evidence established that on January 16, 1969, NMU paid Perry $104,595.16 to cover salary, severance pay and vacation pay through October 20, 1974, and that, on the same day, the Pension Plan delivered to Perry a post-dated check (January 20, 1969) in the amount of $222,200. The evidence at the hearing showed, in relevant part:

STATEMENT OF FACTS *(Perry)*.

Perry had been employed by NMU since 1954, and as Assistant to the President since 1958. On August 2, 1966, he entered into an employment contract with NMU which provided that he would continue in the employ of NMU to serve as Assistant to the President until October 30, 1974. Paragraph 3 of the contract provided.

> "In the event that this Agreement or Perry's employment should be terminated, with or without cause, price to the expiration date hereof . . . Perry shall be entitled to continue to receive his said salary

1. Sarah Laderhandler .... $ 9,201
   James Tevan ..... $ 12,799
   Sophia Tevan ..... $ 11,561
   Irving Brauch $115,510

> in full, including contributions to the NMU Officers Pension Plan and any other fringe benefits payable to the National Officers as under paragraph 2 hereof, during the balance of the term hereof . . . In the event, however, of such termination . . . Perry shall have the option to demand and receive at one time . . . an amount equal to the said total salary, *including contributions to the NMU Officers Pension Plan* and any other fringe benefits payable to National Officers which he would have received during the balance of the original term . . . ." (Emphasis added.)

Attached at the end of Perry's contract is an undated statement signed by Freedman, Segal and Karchmer, the Trustees of the Pension Plan, by which they acknowledged that paragraph 4 [2] of Perry's Agreement "shall be binding upon us and our successors in determining William Perry's entitlement to participation in, and benefits from, the NMU Officers Pension Plan." This statement may have been added on or about August 29, 1966, on which day Freedman, following discussions with Karchmer and Segal, furnished them with his legal opinion that:

> "There is no question but that this is a valid and binding agreement, and Perry's status as a covered employee continues at least until October 20, 1974, regardless of whether his services are discontinued by the union prior to that date. I recommend that the Trustees of the NMU Officers Pension Plan approve

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2. Paragraph 4 provides:

"4. For the purposes of determining Perry's entitlement to participation in and benefits from, the NMU Officers Pension Plan, the parties recognize, understand and agree that Perry shall be deemed to be a 'Participant' in 'Covered Employment' (as defined in the said Plan) during the full period of the original term of this Agreement, and the full four-year period of each renewal or extension thereof, notwithstanding anything to the contrary contained in paragraph 3 or any other provision of this Agreement."

and adopt the agreement to the extent that it relates to the NMU Officers Pension Plan."

In May of 1968, the plaintiffs wrote letters to Wall, Secretary-Treasurer of NMU, requesting that NMU institute suit or other proceeding to recover, on behalf of NMU, all monies contributed to the Pension Plan with rspect to non-officers, including the "Assistant to the President" (Perry). These letters were sent by certified mail on May 17 and May 23, 1968. Wall testified that he had received the letters. Curran testified that copies of the letter were handed to him but that he paid no attention to them as he considered them "propaganda". There is no evidence that these letters were brought to the attention of Segal and Karchmer or, but, according to Wall, they were brought to the attention of Freedman, who was both General Counsel of NMU and a Trustee of the Pension Plan.

On November 4, 1968, De Novellis, the Administrator of the Pension Plan, who worked in Segal's office, computed, at the request of Breit, the Controller of NMU, the lump sum equivalent of Perry's Regular Pension Benefit as of October 20, 1974, in the amount of $222,200.

On December 18, 1968, Curran sent a memorandum to Breit instructing him to prepare a check in the amount of $41,250.01 to be paid to the Pension Plan for Perry's account, and on the following day, December 19, NMU forwarded a check signed by Curran, in this amount, to the Pension Plan, which was in addition to NMU's regular contribution.[3] Upon receipt of the check for Perry's ac-

3. Article II, Section 2 of the amended Agreement and Declaration of Trust between NMU and the Trustees of the Pension Plan provides that NMU shall make quarterly payments to the Pension Plan equal to 26% of the compensation paid by NMU to the participants in the Pension Plan. There is no provision in the amended Agreement and Declaration of Trust authorizing special payments, such as the one made for Perry's account on December 19, 1968.

count, Karchmer, thinking it unusual, photostated the check. Karchmer testified that the check "wasn't accompanied with a regular routine report", but he believed that he received Curran's memorandum of December 18, 1968 or other substantiating data from Breit.

January 16, 1969.

Curran testified that at 9:30 a.m. he called Perry into his office and fired him, and that he immediately thereafter notified such officers as were available, adding that not many officers were available since they were conducting an election. (Apparently, pursuant to the order of Judge Motley, 284 F. Supp. 47 (1968).)[4] Curran then instructed Sovel, Freedman's partner, (Freedman being in Philadelphia that day), to examine Perry's contract and to see what Perry had coming to him. As Wall, the Secretary-Treasurer, was not available, Curran instructed Breit "to prepare everything that was coming to him" [Perry]. At some time during the same day Perry was handed a check signed by Curran, in the amount of $104,595.16, which check, according to Curran, covered Perry's wages, severance pay, vacation pay, and "all other monies due him" through October 20, 1974.

Freedman testified that at about 9:30 a.m. Sovel telephoned him in Philadelphia and told him that Perry had been fired. Apparently, by 10:00 a.m. Perry's application for pension benefits was prepared by Breit and delivered to Segal, because Freedman testified that at about 10:00 a.m. Segal telephoned him in Philadelphia asking for his

4. Curran testified that he had fired Perry a month before, but continued him when Karchmer interceded. In his deposition taken on November 11, 1970, Curran testified that on January 21, 1969 he told Perry he was preparing to recommend to the NMU National Office that Perry's position be abolished and that Perry's employment be terminated. Curran also testified in his deposition that he told no one about firing Perry until NMU's National Office meeting held on January 23, 1969.

legal opinion. Freedman testified that he immediately called Sovel. After satisfying himself that the $41,250.01 had been paid to the Pension Plan (which the record indicates was done on December 19, 1968), Freedman dictated his legal opinion[5] over the telephone to Sovel and authorized Sovel to sign his (Freedman's) name to it and deliver it to Segal. Apparently, Freedman's opinion was delivered to Segal forthwith because before the lunch hour Perry's application had been processed by Segal's office, delivered to the Trustees for their authorization,[6] and the authorization had been signed by Karchmer and Segal as Trustees, and by Sovel, who signed Freedman's name as Trustee.[7]

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5. Freedman's legal opinion reads as follows:

"You have posed certain questions in connection with the retirement of Mr. William Perry as Assistant to President Joseph Curran of the National Maritime Union. The following are my answer to your inquiries:

1) Is Mr. Perry entitled to credit for covered employment for the period through October 20, 1974?

Yes, based on his contract with the Union, dated August 2, 1966, and pursuant to which contributions have been made by the Union to the Plan for the period through October 20, 1974.

2) In determining the amount of his pension benefits what attained age of William Perry is to be used?

His attained age as of October 20, 1974.

3) Is Mr. Perry entitled to receive immediate payment of the benefits which are payable to him in accordance with the answers to the above questions?

Yes.

I trust that the foregoing answers your inquiries."

6. The Pension Plan provides that it is within the sole discretion of the Trustees to make a lump sum payment of a Regular Pension Benefit (Article II, Section 1).

7. There is no provision in the Agreement and Declaration of Trust providing that a trustee may delegate his authority to a non-trustee. Freedman testified that he authorized Sovel to sign his name as Trustee after Sovel told him, "Mr. Perry is anxious to get it through (the payment of $222,200.) and everybody here [NMU] is anxious to get finished with the thing . . . ." (Tr. 305)

After lunch, Perry, accompannied by at least two gentlemen, one of whom was an officer of NMU, appeared in Karchmer's office and Perry presented the approved application to Karchmer and received from Karchmer a check payable to him in the amount of $222,200. postdated January 20, 1969.

So, despite being fired at 9:30, it wasn't a bad day for Mr. Perry.

On February 4, 1969, NMU not having started suit pursuant to plaintiffs' request of May, 1968, Judge Bryan signed an order authorizing the plaintiffs to sue under LMRDA.

MOTIONS TO DISMISS.

Each of the moving defendants contends that plaintiffs, as members of NMU, lack standing to seek to surcharge the defendants and that this court has no jurisdiction under Section 501 of LMRDA. Defendant Trustees Segal, Freedman and Karchmer contend that they have not breached their fiduciary duty as Trustees, and defendants Curran and Wall contend that they have not breached their fiduciary duty as union officers.

In 1958, the Senate Select Committee on Improper Activities in the Labor or Management Field issued an interim report stating that over ten million dollars in union funds were either stolen, embezzled, or misused by the officials of five labor unions over a period of fifteen years. One of the purposes of Congress in enacting LMRDA was to correct these abuses. Senate Report No. 187, 86th Cong., 1st Sess. (1959); H. R. Rep. No. 741, 86th Cong., 1st Sess. (1959). Section 401 of LMRDA, the Congressional declaration of findings, purposes and policy, provides in part as follows:

"(b) The Congress further finds, from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants and their officers and representatives."

Section 501(a) provides that "the officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group."[8]

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8. ". . . It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy."

Section 501(b) provides:

"When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or assure an accounting or other appropriate relief within a reason-

In *Garton v. Arons,* 339 F. 2d 371, 375 (2d Cir. 1964), the Court of Appeals held that Section 501 is applicable only to those breaches of fiduciary duty involving union funds and property. Therefore, the threshold issue is whether for the purposes of Section 501 the funds which the Pension Plan paid to non-officers were funds of NMU.

There is authority that Section 501 does not reach employer appointed trustees of a "trust in which a labor organization is interested." (Section 402(1) of LMRDA.) *Tucker v. Shaw,* 308 F. Supp. 1, 8 (E. D. N. Y. 1970). But see, Dugan, *Fiduciary Obligations Under the New Act,* 48 Geo. L. J. 277, 293-94 (1959); Clark, *The Fiduciary Duties of Union Officials Under Section 501 of LMRDA,* 52 Minn. L. Rev. 437, 476 (1967). Here, however, the Pension Plan was established by NMU for the exclusive benefit of its officers, and the Trustees were appointed by NMU. The Court of Appeals determined that the Trustees were fiduciaries under Section 501 (423 F. 2d at 400), and they have been enjoined from making payments to non-officers out of the Pension Plan.

Pursuant to the judgment of this court in this action filed February 18, 1972, the Trustees of the Pension Plan have returned to NMU the full amount of its contributions made for the account of non-officers. Pursuant to the same

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8. (Cont'd.)
able time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any state court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation."

judgment, the Trustees of the Pension Plan were granted judgment against Perry, a non-officer, in the amount of $222,200. paid to him on January 16, 1969, and which the Trustees are now seeking to recover from Perry. This judgment was obtained by the plaintiffs, suing on behalf of NMU, and it is the law of the case that the action is under Section 501. There is no assurance that the Trustees of the Pension Plan will be able to recover the amounts which they improperly paid to Perry. Indeed, it may be that because of this payment to Perry the Trustees will be unable to make the payments to officers of NMU in accordance with the Agreement and Declaration of Trust unless further contributions to the Pension Plan are made by NMU. Therefore, plaintiffs, suing on behalf of NMU, have an interest under Section 501 to surcharge the Trustees of the Pension Plan in the event that the payment to Perry was in breach of their fiduciary duty as Trustees, it having been already determined that the payment to Perry was not in accordance with NMU's constitution. The payment to Perry came out of funds received from NMU and, accordingly, constituted NMU funds for the purposes of Section 501.

Defendant Trustees also contend that plaintiffs have no standing as a matter of trust law since they sue derivatively on behalf of NMU which, as settlor of the trust created under the Pension Plan, has no claim against the Trustees. III A. Scott, The Law of Trusts, § 200.1 (3d ed. 1967). *But see Burnet v. Wells,* 289 U. S. 670, 679 (1933); Note, *Right of a Settlor to Enforce a Private Trust,* 62 Harv. L. Rev. 1370, 1374-75 (1949). However, as the court in *Highway Truck Drivers and Helpers Local 10 v. Cohen,* 102 F. Supp. 608 (E. D. Pa.), *aff'd,* 284 F. 2d 162 (3d Cir. 1960), *cert. denied,* 365 U. S. 833 (1961), said:

> "Section 501, with which we are particularly concerned, is entitled 'Fiduciary responsibility of officers

of labor organizations.' This section, quoted earlier, attempts to define in the broadest terms possible the duty which the new federal law imposes upon a union official. Congress made no attempt to 'codify' the law in this area. It appears evident to us that they intended the federal courts to fashion a new federal labor law in this area, in much the same way that the federal courts have fashioned a new substantive law of collective bargaining contracts under §301(a) of the Taft-Hartley Act, 29 U. S. C. A. §185(a). See Textile Workers Union of America v. Lincoln Mills, 1957, 353 U. S. 448, 77 S. Ct. 923, 1 L. Ed. 2d 972. In undertaking this task the federal courts will necessarily rely heavily upon the common law of the various states. Where that law is lacking or where it in any way conflicts with the policy expressed in our national labor laws, the latter will of course be our guide."

182 F. Supp. at 617)

In carrying out the policy of LMRDA, the court concludes that, on the facts here stated, NMU has a claim against the Trustees if they violated their fiduciary duty. Moreover, as a matter of trust law, "it is the function of the court to see that the directions of the settlor [NMU] are carried out, even though no one complains to the court of the failure of the trustee to carry them out . . . ." Scott, *supra*, § 200.4 at 1640.

A reading of Perry's contract and of the Pension Plan fails to reveal any basis on which the Trustees of the Pension Plan could pay Perry a lump sum pension in 1969 based on his continuing in NMU's employ until October 20, 1974. Indeed, Perry's contract provided that in the event of his discharge he would be paid an amount equal to his total salary, "including contributions to the NMU Officers Pension Plan." This was the $41,250.01 which NMU paid

to the Pension Plan on December 19, 1968 at the direction of Curran.

Both Curran and Wall signed the Perry employment contract on behalf of NMU. On December 19, 1968, when NMU paid $41,250.01 to the Pension Plan for Perry's account, and on January 16, 1969 when the Pension Plan paid Perry $222,200., Wall and probably Curran were aware of plaintiffs' request that NMU institute suit to recover all monies contributed to the Pension Plan with respect to non-officers. This, coupled with the events of January 16, 1969, establishes at least a prima facie case that, as to the payment to Perry, the NMU officers, Curran and Wall, breached their fiduciary duty under Section 501(a).

The Trustees, Segal, Freedman and Karchmer, knew about the Perry employment contract. Freedman drew it, and as early as August, 1966, Segal and Karchmer had requested Freedman's legal opinion. Freedman's opinion letters of August 29, 1966 and January 16, 1969 do not show why the Trustees were authorized either to receive the payment of $41,250.01 for Perry's account or to pay Perry, as of January 16, 1969, a lump sum pension benefit computed to October 20, 1974. Indeed, there was nothing in the Agreement and Declaration of Trust or the Pension Plan providing for accelerated payments by NMU to the Pension Plan, and under the Pension Plan and Perry's contract it appears that October 20, 1974 was the earliest date on which Perry could have become eligible to receive a lump sum pension payment of $222,200.

The role of Mr. Freedman is particularly hard to understand. The evidence discloses that he was acting as a Trustee of the Pension Plan, giving legal advice to the other Trustees as to the Perry contract, which he had drawn, and at the same time was counsel for NMU. Moreover, in the early stages of this litigation he had acted as counsel for Perry.

On January 16, 1969 when defendant Freedman dictated his legal opinion over the telephone and had his name signed to it by Mr. Sovel, the evidence is clear that Mr. Freedman was on notice that the plaintiffs had requested NMU to institute an action to stop payments under the Pension Plan to non-officers, and he knew that Perry was a non-officer. While there is no evidence that defendants Segal and Karchmer knew this, the undue haste in which they were called upon to act on January 16 should at least have put them on inquiry. Indeed, Segal telephoned Freedman in Philadelphia and it must have seemed strange to have the opinion returned to him in New York bearing Freedman's signature an hour or so later. As to Karchmer it is hard to understand his haste in giving a post-dated check to Perry.

Segal and Karchmer contend that they were entitled to rely on the opinion of counsel. This proposition is true as a general rule, but here they were relying on the opinion of their fellow Trustee, Freedman, whom they knew to be general counsel for NMU, and Segal, at least, knew that the opinion of counsel was not the result of any deliberation on Freedman's part.

It is true that the Agreement and Declaration of Trust limits the liability of the Trustees to wilful misconduct. However, plaintiffs have made out a prima facie case of wilful misconduct on the part of the Trustees as to the payment to Perry.

As to the payments by the Pension Plan to the other non-officers, plaintiffs have failed to prove by a preponderance of the evidence that Curran, Wall, Segal, Freedman or Karchmer were guilty of a breach of fiduciary duty for which they can be held personally liable.

The motions of the defendants Curran, Wall, Segal, Freedman and Karchmer at the end of plaintiffs case, are

granted with respect to the payments made to non-officer employees other than Perry. The motions are denied with respect to the payment made to defendant Perry by the Pension Plan on January 16, 1969. The hearing will be continued on July 7, 1972, at 10:00 A. M. in Room 618, United States Court House, at which time these defendants may present their evidence.

It is so ordered.

DUDLEY B. BONSAL,
U. S. D. J.

Dated: New York, N. Y.
June 27, 1972.

DISTRICT COURT OPINION, OCTOBER 26, 1972.

BONSAL, D. J.

In prior proceedings it has been held that the 1960 constitution of the National Maritime Union of America ("NMU") did not authorize the inclusion of non-officers of NMU in the NMU Officers Pension Plan ("the Officers Pension Plan"), and that NMU was entitled to recover from the Trustees of the Officers Pension Plan all amounts paid by NMU into the Officers Pension Plan for the account of non-officers, plus interest. *Morrissey v. Curran*, 302 F. Supp. 32 (S. D. N. Y. 1969), *aff'd in part, rev'd in part*, 423 F. 2d 393 (2d Cir.), *cert. denied*, 399 U. S. 928 (1970), 400 U. S. 826 (1970), *on remand*, 336 F. Supp. 1107 (S. D. N. Y. 1972). Accordingly, on February 18, 1972, judgment was entered in favor of NMU against the Officers Pension Plan in the amount of $674,222.60 (representing $520,283.38 paid by NMU to the Officers Pension Plan for the account of non-officers, plus interest in the amount of $153,939.22), which judgment has been paid. On February 18, 1972, judgment was also entered in favor of the Officers Pension Plan against the defendant William Perry ("Perry"), a non-officer, in the principal amount of $222,200. (the amount of the lump sum pension paid to him), plus interest in the amount of $41,107., or a total of $263,307. This judgment has not been paid. The court has been advised that the Officers Pension Plan has instituted supplementary proceedings to collect the Perry judgment.

By Memorandum filed January 11, 1972, plaintiffs were authorized to "notice a hearing to determine the personal liability, if any, of the defendant trustees [of the Pension Plan]. Freedman, Segal and Karchmer, and officers [of NMU]. Curran and Wall, to NMU for the monies which

the Pension Plan has paid out to non-officers and which it is unable to recoup." The hearing was held, and plaintiffs presented their evidence on April 13, 14 and May 1, 1972. The defendants then moved to dismiss, pursuant to Rule 41(b), F. R. Civ. P., on the ground that plaintiffs had shown no right to relief. By Memorandum filed June 29, 1972, the defendants' motions were granted with respect to the payments made to non-officer employees of NMU other than Perry,[1] and were denied with respect to the payment made to defendant Perry by the Officers Pension Plan on January 16, 1969. On July 12, 1972, the hearing was resumed and the defendants presented their evidence.

Plaintiffs are members of NMU, suing on behalf of all of its members under Section 501[2] of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U. S. C. § 501. Defendants Martin Segal ("Segal"), Abraham E. Freedman ("Freedman") and Leon Karch-

---

1. These payments were made as follows:

Sara Laderhandler	$ 9,201
James Tevan	$ 12,799
Sophia Tevan	$ 11,561
Irving Brauch	$115,510

2. Section 501(a) provides, to the extent here relevant:

"(a) The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization."

mer ("Karchmer") are the trustees of the Officers Pension Plan pursuant to an Agreement and Declaration of Trust of December 29, 1952 as subsequently amended. Freedman is also General Counsel of NMU. Defendant Joseph Curran ("Curran") is the President of NMU. Defendant Shannon Wall ("Wall") is the Secretary-Treasurer of NMU.

Freedman became a trustee of the Officers Pension Plan in 1963 when he became General Counsel of NMU. As trustee, Freedman drafts legal documents for the Officers Pension Plan and renders legal opinions to the other trustees.

Segal has been a trustee since the inception of the Officers Pension Plan in 1953, and the Martin E. Segal Company ("the Segal Company"), of which Segal is Chairman of the Board, has administered it. The Segal Company processes pension applications and computes pension benefits. The Segal Company also is the actuary for the NMU Welfare Plan and a pension plan covering the membership of NMU.

Karchmer, an original trustee of the Officers Pension Plan, is a Certified Public Accountant whose firm acts for NMU, the NMU Welfare Plan, the NMU Vacation Plan and the pension plan covering the membership of NMU. Karchmer keeps the books of the Officers Pension Plan and issues and receives checks on its behalf.

Statement of Facts With Respect to Perry.

Perry had been employed by NMU since 1954, and as Assistant to the President since 1958. On August 2, 1966, he entered into an employment contract with NMU which provided that he would continue in the employ of NMU to serve as Assistant to the President until October 20, 1974. Paragraph 3 of the contract provided:

> "In the event that this Agreement or Perry's employment should be terminated, with or without cause, prior to the expiration date hereof . . . Perry shall be entitled to continue to receive his said salary in full, including contributions to the NMU Officers Pension Plan and any other fringe benefits payable to the National Officers as under paragraph 2 hereof, during the balance of the terms hereof. . . . In the event, however, of such termination . . . Perry shall have the option to demand and receive at one time . . . an amount equal to the said total salary, *including contributions to the NMU Officers Pension Plan* and any other fringe benefits payable to National Officers which he would have received during the balance of the original term. . . ." (Emphasis added.)

Attached at the end of Perry's contract is an undated statement signed by Freedman, Segal and Karchmer, the Trustees of the Officers Pension Plan, by which they acknowledged that paragraph 4[3] of Perry's Agreement "shall be binding upon us and our successors in determining William Perry's entitlement to participation in, and benefits from, the NMU Officers Pension Plan." There is appended at the end of this opinion a copy of the Perry contract and of the statement signed by the trustees. The statement signed by the trustees may have been added on or about August 29, 1966, on which day Freedman, follow-

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3. Paragraph 4 provides:

"4. For the purposes of determining Perry's entitlement to participation in and benefits from, the NMU Officers Pension Plan, the parties recognize, understand and agree that Perry shall be deemed to be a 'Participant' in 'Covered Employment' (as defined in the said Plan) during the full period of the original term of this Agreement, and the full four-year period of each renewal or extension thereof, notwithstanding anything to the contrary contained in paragraph 3 or any other provision of this Agreement."

ing discussions with Karchmer and Segal, furnished them with his legal opinion, quoted in part as follows:

"It is my considered judgment that Perry would continue as a 'Participant' in 'Covered Employment', even though his services may be discontinued by the union. The contract specifically so provides and must be so construed without any question.

* * *

"It is made crystal clear in the agreement that both the union and Perry agreed that Perry shall be deemed to be an employee of the NMU during the full term of the agreement, including any renewals or extensions. As above indicated, the agreement first of all provides that Perry shall continue in the 'employ' of NMU as Assistant to the President until October 20, 1974.

"Paragraph 1 of the agreement specifically requires the union to pay his salary, contributions to the NMU Officers Pension Plan and fringe benefits during the entire term of the agreement. Paragraph 2 of the agreement pointedly covers the inquiry made by Marty and provides that the payment of salary, contributions to the NMU Officers Pension Plan must be paid to the end of the term, notwithstanding any termination of his services with or without cause prior to the expiration date. Paragraph 3 expressly provides that Perry is to be deemed to be a 'Participant' in 'Covered Employment' (as defined in the Plan) during the full term of the original agreement and any extension. Paragraph 4 of the agreement specifically shows that the parties recognize, understand and agree that Perry shall be deemed to be a 'Participant' in 'Covered Em-

ployment' as defined in the NMU Officers Pension Plan to the very end of the term of the agreement or any extension notwithstanding anything that might be construed to be to the contrary elsewhere in the agreement, such as a termination of services with or without cause.

"In summary, in consideration of Perry's services to the union, past and future, the union agreed to maintain Perry in its employ at least until October 20, 1974 with full pay and all other benefits until the very end of that term or any renewal thereafter. There is no question but that this is a valid and binding agreement, and Perry's status as a covered employee continues at least until October 20, 1974, regardless of whether his services are discontinued by the union prior to that date. I recommend that the Trustees of the NMU Officers Pension Plan approve and adopt the agreement to the extent that it relates to the NMU Officers Pension Plan."

In May of 1968, the plaintiffs wrote several letters to Wall, Secretary-Treasurer of NMU, demanding that NMU institute suit or other proceeding to recover, on behalf of NMU, all monies contributed to the Officers Pension Plan with respect to non-officers, including the "Assistant to the President" (Perry). These letters were sent by certified mail on May 17 and May 23, 1968. Wall received the letters, made copies of them available to Curran and Charles Sovel, Freedman's law partner, and after checking the NMU constitution and conferring with Sovel, Wall decided not to institute suit on behalf of NMU. There is no evidence that plaintiffs were notified. Curran testified that copies of plaintiffs' letters were handed to him but that he paid no attention to them as he considered them "propa-

ganda." There is no evidence that plaintiffs' letters were brought to the attention of Segal and Karchmer.

In a letter dated November 4, 1968, Mr. De Novellis, an administrator of the Officers Pension Plan at the Segal Company, informed Perry, at the request of Milton Breit, the controller of NMU, that as of October 20, 1974 the lump sum equivalent of his Regular Pension Benefit would be $222,200.

On December 18, 1968, Curran sent a memorandum to Breit instructing him to prepare a check in the amount of $41,250.01 to be paid to the Officers Pension Plan for Perry's account. The memorandum read in part, as follows:

> "This check represents the monies due in accordance with the employment contract agreement with the National Maritime Union of America and William Perry. The computation of the amount of $41,250.01 is based upon Mr. William Perry's current regular and vacation pay and is for the period December 1, 1968 thru and including October 20, 1974 multiplied by the current percentage rate of contribution which is 26%."

On the following day, December 19, NMU forwarded a check, signed by Curran, to the Officers Pension Plan in this amount for the account of Perry, which was in addition to NMU's regular contribution due at that time.[4]

4. Article II, Section 2 of the amended Agreement and Declaration of Trust between NMU and the Trustees of the Pension Plan provides that NMU shall make quarterly payments to the Pension Plan equal to 26% of the compensation paid by NMU to the participants in the Pension Plan. There is no provision in the amended Agreement and Declaration of Trust authorizing special payments, and the Officers Pension Plan did not maintain separate accounts for each participant.

Karchmer photostated the check before depositing it as he had not previously received a payment of this kind. Karchmer testified that the check "wasn't accompanied with a regular routine report," but he believed that he received Curran's memorandum or other substantiating data from Breit.

January 16, 1969

Curran testified that at 9:30 a.m. he called Perry into his office and fired him, and that he immediately notified such officers as were available. He said that not many officers were available since they were conducting a Union election.

Curran testified that after firing Perry, he instructed Freedman's partner Sovel (Freedman being in Philadelphia that day), to examine Perry's contract and to see what Perry had coming to him. As Wall, the Secretary-Treasurer, was not available, Curran instructed Controller Breit "to prepare everything that was coming to him" [Perry]. At some time during the same day, Perry was handed a check signed by Curran, in the amount of $104,595.16, which, according to Curran, covered Perry's wages, severance pay, vacation pay, and "all other monies due him" through October 20, 1974. Curran testified that he had first fired Perry a month before when he directed that the $41,250.01 be paid the Officers Pension Plan for Perry's account, but that he had changed his mind when Karchmer interceded on Perry's behalf.

Freedman testified that at about 9:30 a.m. on January 16, 1969, Sovel telephoned him in Philadelphia and told him that Perry had been fired. Apparently, by 10:00 a.m. Perry's application for pension benefits was prepared by Breit and delivered to Segal, because Freedman testified that at about 10:00 a.m. Segal telephoned him in Philadelphia asking for his legal opinion. Freedman testified that he immediately called Sovel. After satisfying himself that

the $41,250.01 had been paid to the Pension Plan (which the record indicates was done on December 19, 1968), Freedman dictated his legal opinion [5] over the telephone to Sovel

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5. Freedman's legal opinion reads as follows:

(Letterhead of)

ABRAHAM E. FREEDMAN

COUNSELLOR AT LAW AND PROCTOR IN ADMIRALTY

36 Seventh Ave., New York, N. Y. 10011

Oregon 5-4211

Charles Sovel
Stanley D. Gruber
Ned R. Phillips
Edward M. Katz
Martin L. Katz

Philadelphia, Pa. Office
Freedman, Borowsky and Lorry
Chestnut Street at Fifth
Walnut 5-8400

January 16, 1969

Mr. Martin E. Segal
Martin E. Segal Company
730 Fifth Avenue
New York, New York 10019

Re: *William Perry*

Dear Mr. Segal:

You have posed certain questions in connection with the retirement of Mr. William Perry as Assistant to President Joseph Curran of the National Maritime Union. The following are my answers to your inquiries:

1) Is Mr. Perry entitled to credit for covered employment for the period through October 20, 1947?

Yes, based on his contract with the Union, dated August 2, 1966, and pursuant to which contributions have been made by the Union to the Plan for the period through October 20, 1974.

2) In determining the amount of his pension benefits what attained age of William Perry is to be used?

His attained age as of October 20, 1974.

3) Is Mr. Perry entitled to receive immediate payment of the benefits which are payable to him in accordance with the answers to the above questions?

Yes.

I trust that the foregoing answers your inquiries.

With best personal regards, I am,

Sincerely,

/s/ ABRAHAM E. FREEDMAN
Abraham E. Freedman

AEF/ff

and authorized Sovel to sign his (Freedman's) name to it and deliver it to Segal.

Segal testified that after he learned Perry was leaving NMU he telephoned Freedman and asked him whether the period of service to be credited in computing Perry's lump sum pension benefit was to be through 1974. Freedman said it was, and promised to send Segal an opinion letter. In his deposition, Segal testified that this conversation occurred prior to January 16, but at trial he testified that the conversation occurred on the morning of January 16, 1969. Segal also testified that he did not know at the time of the conversation that Freedman was in Philadelphia.

Apparently, before the lunch hour on January 16, 1969, the Freedman opinion letter was delivered to the Segal Company, Perry's pension application was processed and written approval had been given by Segal and Freedman (Sovel signed Freedman's name as trustee). Freedman explained that he authorized Sovel to sign his name after Sovel told him, "Mr. Perry is anxious to get it through [the payment of $222,200] and everybody here [NMU] is anxious to get finished with the thing . . ." (Transcript p. 305).

Karchmer testified that Perry, accompanied by Sovel and two other gentlemen associated with NMU, appeared in his office after lunch and presented him with the pension application. Karchmer testified that before approving the application he carefully studied Freedman's opinion letter because the payment to Perry was the first of its kind. Since there were insufficient funds on hand in the Officers Pension Plan's checking account to cover Perry's lump sum benefit of $222,200, and Perry demanded immediate payment, Karchmer approved the application and issued Perry a check postdated to January 20, 1969.

Karchmer testified that it was unprecedented for an application to be prepared by NMU, processed by the Segal

Company and approved by the trustees, with payment being made on it, in little more than half a day. Karchmer also testified that the payment to Perry was the first of its kind and was the largest payment ever made by the Officers Pension Plan.

On February 4, 1969, since NMU had not commenced suit as requested by plaintiffs in May of 1968, Judge Bryan signed an order authorizing the plaintiffs to sue under LMRDA.

In its memorandum of June 29, 1972, the court found plaintiffs had standing to sue defendants under Section 501 of LMRDA (29 U. S. C. § 501). Therefore, the issue remaining is whether in making the payment of $222,200 to Perry on January 16, 1969, Freedman, Segal and Karchmer breached their fiduciary duty as trustees and Curran and Wall breached their fiduciary duty as NMU officers.

As to the Trustees (Freedman, Segal and Karchmer)

Article III, Section C of the Agreement and Declaration of Trust as revised to October 28, 1961 deals with the powers and duties of the trustees. Paragraph 1 provides:

> ". . . The Trustees shall have full and sole discretion to determine the amount of such benefits and the terms and conditions of payment and shall have the power to conclusively determine all questions concerning the payment of benefits to any individual recipient or proposed recipient."

Paragraph 4 provides that the trustees shall not be liable "for any loss to, or diminution of the Fund, except due to their own wilful misconduct." Paragraph 5 provides:

> "The Trustees . . . shall be protected in relying and acting upon the opinion of legal counsel (including opinion of legal counsel who is . . . a trustee hereunder) in connection with any matter pertaining to the administration or execution of this Trust Fund.

> No trustee shall be liable for any action taken . . . by him unless such act . . . is the result of wilful misconduct, nor for the acts of any . . . attorney selected by the Trustees with reasonable care, nor for any act . . . of any other Trustee."

These provisions must be strictly construed, and they do not relieve a trustee of liability for a breach of trust constituting a willful violation of his duty, or committed in bad faith or with reckless indifference to the interests of the trust, or for any profit a trustee may have derived from the breach of trust. Restatement (Second) of Trusts, § 222 (1959); *Browning v. Fidelity Trust Co.*, 250 F. 321, 325 (3d Cir. 1918) *cert. denied*, 248 U. S. 564 (1918); *Newhouse v. Canal National Bank of Portland*, 124 F. Supp. 239 (D. Maine, 1954).

While these provisions protect the trustees against liability resulting from negligence, *Thompson v. Hays*, 11 F. 2d 244, 248 (8th Cir. 1926), the trustee may be held liable if they have "intentionally disregarded the rules which control the actions of prudent men in conducting their own business affairs." *Crabb v. Young*, 92 N. Y. 56, 57 (1883); *In re Howard*, 110 App. Div. 61, 97 N. Y. S. 23, 24 (2d Dept. 1905), *aff'd* 185 N. Y. 539 (1906).

Under the Pension Plan, the trustees were given sole discretion to make lump sum payments to a participant (NMU Officers Pension Plan, Article V, Section 8). However, neither the Plan nor the Agreement and Declaration of Trust authorized the trustees to make a lump sum payment to Perry in 1969 computed on the pension he would have been entitled to receive at the expiration of his contract on October 20, 1974. Nor does Perry's contract entitle him to such a lump sum payment. Paragraph 3 of Perry's contract hereinbefore set forth gave Perry two options upon the termination of his contract prior to Octo-

ber 20, 1974—he could either continue to receive his salary in full, including contributions to the NMU Officers Pension Plan during the balance of the term, or he could demand and receive at one time an amount equal to the total salary he would have earned to the termination, "including contributions to the NMU Officers Pension Plan." On January 16, 1969, NMU paid Perry an amount equal to the total salary he would have earned to the termination (October 20, 1974). Previously, on December 18, 1968, NMU prepaid the Officers Pension Plan the contributions it would have been required to pay to the termination ($41,250.01).

The only obligation the trustees undertook when they signed the rider to Perry's contract was to include Perry as a participant of the Officers Pension Plan during the full period of the original term of the contract even if his employment was terminated prior to that time. With respect to accepting contributions to the Officers Pension Plan for Perry and paying Perry pension benefits, the trustees were bound by the terms of the Agreement and Declaration of Trust and the Pension Plan.

Freedman's legal opinion of January 16, 1969 stated that Perry was entitled to credit for covered employment for the period through October 20, 1974 based on his contract with NMU, pursuant to which "contributions have been made by the Union to the Plan for the period through October 20, 1974," and that Perry was "entitled to receive immediate payment." This was wrong, on both counts.

Under the Agreement and Declaration of Trust, the prepayment of contributions to the Officers Pension Plan on behalf of Perry was not authorized. Article II, Section 2 of the Amended Agreement and Declaration of Trust is the sole provision covering contributions to the Officers

Pension Plan. It provides that NMU shall make quarterly payments to the Officers Pension Plan equal to 20% of the compensation paid by NMU to the participants in the Officers Pension Plan for that quarter. Moreover, as Karchmer testified, "Payments which were made to the trustees were made without specific application to any beneficiary of the Plan. There were no separate accounts for beneficiaries."

Nor was there any legal basis, despite Freedman's opinion, for the payment to Perry of a lump sum pension of $222,220 on January 16, 1969. This pension was payable on October 20, 1974, and then only if the trustees at that time exercised their discretion under Article V, Section 8 of the Pension Plan to pay Perry a lump sum. Before October 20, 1974, this court and the Court of Appeals held that the inclusion of Perry in the Officers Pension Plan violated NMU's constitution.

Freedman acted simultaneously as a trustee, counsel to the trustees, and counsel to NMU. He had drawn the Perry contract, and represented Perry in the earliest stages of this litigation. The evidence shows that he dictated his legal opinion from the top of his head while in Philadelphia and had his name signed to it by Sovel. He showed a reckless indifference to his duty as a trustee as well as the interests of his fellow trustees, who relied on his opinion. Indeed, he was indifferent to his duty to NMU as well, as he knew that Perry's participation in the Officers Pension Plan had been challenged by the plaintiffs (which challenge was later sustained by this court and the Court of Appeals). Moreover, he knew, or should have known, that NMU made quarterly payments to the Officers Pension Plan equal to 26% of the compensation paid *for that quarter,* and, as pointed out by Karchmer, the payments were made without specific application to any beneficiary, as there were no separate accounts for beneficiaries.

The court concludes with regret that Freedman acted with reckless indifference to his duty as trustee. Therefore, as trustee, he will be subject to surcharge for the lump sum pension paid to Perry.

Segal, an acknowledged expert in the pension field, testified that the payment of Perry's lump sum pension several years before the termination of his contract was unique in his experience. He was also aware of the pressure to which the trustees were being subjected to make the payment on the same day that Perry was presumably fired, and that very little time elapsed between his request for Freedman's legal opinion and its delivery.

Karchmer was put on inquiry the previous December when he received NMU's check for $41,250.01 for Perry's account, which he thought unusual enough to photostat. He testified that Perry's lump sum payment was the first of its kind and largest ever made by the Officers Pension Plan, and processed faster than any other. Despite this, he delivered a post-dated check to Perry on the day of Perry's application.

The evidence does not show that Segal and Karchmer knew that the inclusion of Perry and other non-officers in the Officers Pension Plan had been challenged by the plaintiffs. Moreover, the Agreement and Declaration of Trust specifically protected them in "relying and acting upon the opinion of legal counsel (including opinion of legal counsel who is . . . a trustee . . .) in connection with any matters pertaining to the administration or execution of this Trust Fund." Both Segal and Karchmer relied on, and acted upon, Freedman's opinion in making the payment to Perry. While on the facts presented they were negligent in doing so, there is no evidence that they willfully violated their duty as trustees or were guilty of bad faith. The Agreement and Declaration of Trust specifically protects them

from liability from the acts of any other trustees. Accordingly, they cannot be surcharged for the payment to Perry, and judgment may be entered dismissing the action as against them.

NMU Officers (Curran and Wall)

Curran, President of NMU, had a fiduciary responsibility under Section 501(a) of LMRDA (29 U. S. C. §501(a)) with respect to the funds of NMU. For the purposes of Section 501(a), the funds paid by NMU to the Officers Pension Plan and by it to Perry were funds of NMU. Curran negotiated the Perry employment contract and signed it on behalf of NMU, and had also signed the Agreement and Declaration of Trust. Although he dismissed plaintiffs' request as propaganda, Curran knew that the plaintiffs had requested NMU to institute this action to recover monies paid to the Officers Pension Fund for the account of non-officers on the ground that such payments violated the NMU constitution, and that it was charged that Perry was a non-officer. Curran was in a position of trust to expend NMU funds only in accordance with the NMU constitution. Curran also knew or should have known that the Agreement and Declaration of Trust did not authorize the prepayment of contributions to the Officers Pension Plan. Nevertheless, on December 18, 1968, when he fired Perry for the first time, he instructed Breit to prepare a check from NMU funds in the amount of $41,250.01 to be paid to the Officers Pension Plan for Perry's account, and on the following day he signed the check, which was then forwarded to the Officers Pension Plan. However, the $41,250.01 has been recoverd by NMU, so that even if he violated his fiduciary duty, there is no occasion for surcharging him in this amount.

Curran testified that on January 16, 1969 he fired Perry (for the second time), and that immediately thereafter he

instructed Controller Breit to prepare everything that was coming to Perry. He signed the check to Perry in the amount of $104,595.16 covering Perry's wages, severance pay, vacation pay, and "all other monies due him" through October 20, 1974. This would appear to have been in accordance with Paragraph 3 of Perry's contract, which provided that in the event of termination, Perry could demand and receive at one time an amount equal to his total salary and other fringe benefits which he would have received during the balance of the original term. The evidence indicates that Curran dominated the people who had anything to do with the payment from the Officers Pension Plan to Perry. Karchmer testified, "Well, to go in to Joe [Curran] is a very fearful process." (451). Freedman testified that he was told by Sovel, "Mr. Perry is anxious to get it through and everybody here is anxious to get finished with the thing." (305). When Perry appeared in Karchmer's office to obtain the check for $222,200, he was accompanied by Freedman's partner Sovel, Strassman, an officer of NMU, and Shapiro, Executive Director of the NMU Pension Welfare Fund. (459). Undoubtedly, Curran used the power of his office to get Perry everything that was coming to him on January 16th. However, there is no evidence that on January 16th Curran directed the payment to Perry of $222,200 or directed Freedman to furnish the legal opinion to the trustees. Consequently, on the evidence presented, plaintiffs have failed to prove that Curran breached his fiduciary duty under LMRDA. See *Richardson v. Tyler*, 309 F. Supp. 1020 (N. D. Ill. 1970).

Wall, Secretary-Treasurer of NMU, knew that plaintiffs had requested NMU to institute action to recover monies attributed to the Officers Pension Plan with respect to non-officers. Indeed, he testified that he brought this to the attention of Curran and the NMU lawyers. However,

the evidence establishes that he played no part either in the payment of the $41,250.01 paid to the Officers Pension Plan on December 18, 1968 or in the events of January 16, 1969. Accordingly, there is no basis for finding that Wall breached his fiduciary duty under LMRDA.

For the foregoing reasons, defendant Freedman is surcharged with respect to the $222,200 paid by the Officers Pension Plan to Perry and which has not been repaid. The application to surcharge the defendants Segal, Karchmer, Curran and Wall is denied, and the action is dismissed with respect to them.

The foregoing constitutes the court's findings of fact and conclusions of law. F. R. Civ. P. 52(a).

Settle judgment on notice.

DUDLEY B. BONSAL,
U. S. D. J.

Dated: New York, N. Y.
October 26, 1972.

COURT OF APPEALS OPINION.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 689, 1089, 1090, 1091—September Term, 1972.
(Argued April 11, 1973 Decided June 18, 1973.)
Docket Nos. 72-2443
73-1082
73-1363
73-1383

JAMES M. MORRISSEY, JOSEPH PADILLA, RALPH IBRAHIM, individually and on behalf of the members of the National Maritime Union of America,
Plaintiffs-Appellants-Appellees,

v.

JOSEPH CURRAN, SHANNON WALL, WILLIAM PERRY, ABRAHAM E. FREEDMAN,
Defendants-Appellees-Appellants,

MARTIN SEGAL and LEON KARCHMER,
Defendants-Appellees.

Before: SMITH, HAYS, and TIMBERS, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Southern District of New York, Dudley B. Bonsal, *Judge,* holding that (1) the decision of this court on a prior appeal did not require that all payments made to the Officers' Pension Fund on account of non-elected personnel be refunded to the Union; (2) the trustees Segal and Karchmer should not be surcharged for the payments

to Perry and Brauch; (3) the trustee Freedman should be surcharged for the payment to Perry but not Brauch; (4) the defendant officers Curran and Wall are not personally liable for the payments to Perry or for the amount set aside to establish a trust fund for current employees; and (5) award of counsel fees to plaintiffs in the sum of $111,864 shall be assessed against the Union.

Affirmed.

ARTHUR E. MCINERNEY (Duer & Taylor, New York, New York, on the brief), *for Plaintiffs-Appellants-Appellees.*

JOSEPH P. ALTIER (Ira Gammerman, Bromsen, Gammerman, Altier & Wayne, New York, New York, on the brief), *for Defendants-Appellees-Appellants Joseph Curran and Shannon Wall.*

SIMON H. RIFKIND (Neil H. Cogan, Paul, Weiss, Rifkind, Wharton & Garrison, New York, New York, on the brief), *for Defandant-Appellee-Appellant Abraham E. Freedman.*

ARTHUR S. OLICK (Kriendler, Relkin, Olick & Goldberg, New York, New York, on the brief), *for Defendant-Appellee-Appellant, William Perry.*

ROY L. REARDON (Melvyn L. Cantor, Ronald L. Ginns, Simpson, Thacher & Bartlett, New York, New York, on the brief), *for Defendant-Appellee Martin Segal.*

HERMAN E. COOPER (Surrey, Karasik, Morse & Seham, New York, New York, on the brief), *for Defendant-Appellee Leon Karchmer.*

HAYS, *Circuit Judge:*

This action was brought under the provisions of Section 501 of the Labor Management Reporting and Disclosure Act, 29 U .S. C. § 501 by plaintiffs as members of the National Maritime Union of America. Defendants Curran and Wall were the President and Secretary-Treasurer of the NMU. Defendants Karchmer, Segal and Freedman were trustees of the NMU Officers' Pension Plan. Defendant Perry is the former Assistant to the President of the NMU.

In the original complaint plaintiffs asked for several forms of relief:

(a) an accounting of monies expended by the NMU and the trustees of the NMU Officers' Pension Plan for pension benefits on behalf of non-elected officers and employees of the Union; (b) damages from certain of the defendants; (c) an injunction against the trustees to restrain them from paying any pension benefits to non-elected officers and employees of the Union; and (d) an award of counsel fees.

The origin of the dispute is to be found in a trust agreement executed in 1952 by the National Council of the NMU pursuant to its authority to provide pensions for its officers and employees. Originally, the trust agreement provided for pensions only for officers, and in 1953, the trustees under the agreement adopted a pension plan for the officers of the NMU. The funds of the trust came from an initial contribution from the union supplemented by quarterly installments.

In 1961 the trust was amended to include in the pension plan certain employees of the Union.[1] The Union contrib-

1. The 1961 amendment broadened the coverage of the pension fund to include the following categories of persons:

1) "Union Representatives," defined as persons employed in the

uted additional funds to cover the cost of the expanded pension plan.

In 1964 the pension plan was again altered to include some full time employees of the Union not previously covered.[2]

In this action, originally brought in 1969, plaintiffs charged that the 1961 and 1964 amendments to the trust agreement including non-elected employees in the pension plan were void because they were adopted on behalf of the NMU by the National Office rather than the National Council. The district court granted plaintiffs' cross-motion for summary judgment, holding that the inclusion of certain non-officer employees of the NMU Officers' Pension Plan was improper. The district court ordered the defendants to account, enjoined the trustees from paying pension benefits to non-officers, and directed the trustees to return to the Union all moneys received by them for the benefit of non-officers.

This court affirmed [3] the decision of the district court, *Morrissey v. Curran*, 423 F. 2d 393 (2nd Cir.), *cert. denied*,

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1. (Cont'd.)
positions of Assistant to the President and Organizer; and 2) "Supervisory or Professional" employees of the Union occupying the positions of Maintenance Supervisor, Bookkeeping Supervisor, Records and Supply Supervisor, Executive Secretary, Publicity Director and Editor of the "Pilot."

2. Under the 1964 Amendment, the coverage was broadened to include:

> "All other employees of the union except (a) any employee whose compensation, hours of work or conditions of employment are determined by or with reference to a collective bargaining agreement, (b) any employee whose customary employment by the union is for not more than twenty (20) hours in any one week or for not more than five (5) months in any one calendar year, and (c) aliens employed in a foreign country."

3. The district court had held effective an attempt by the union to validate retroactively the pension amendments. This court reversed that aspect of the district court's determination.

400 U. S. 826 (1970) and remanded the case to insure that the accounting and the return of funds to the union treasury proceed as ordered. The Supreme Court denied certiorari.

On remand, the district court entered judgment against the trust fund and in favor of the union in the sum of $520,283.39, the amount of contributions made to the plan on behalf of the employees who were held to be ineligible. Although the district court found that the trustees had made unlawful pension payments to employees in the amount of $371,271 it held that except with respect to the payments made to Perry, none of the defendants could be surcharged. As to Perry it held that Freedman, one of the trustees of the pension plan, was personally liable for the payments.

Plaintiffs contend that the judgment of the district court is inadequate because it does not include moneys paid on account of the NMU officers who were appointed rather than elected. Plaintiffs also claim that the trustees should have been surcharged for payments made by them to Irving Brauch, a non-officer employee, that defendants Curran and Wall should have been surcharged for the payments to Perry, that defendants Karchmer and Segal should have been surcharged for the payments to Perry, and that the award of fees to their attorneys and accountants was inadequate. Defendants Curran and Wall appeal on the grounds that the award to plaintiffs' attorneys and accountants was excessive. Defendant Freedman appeals on the grounds that he should not have been surcharged with respect to payments to Perry.

I.

The first issue raised by plaintiffs is whether the district court correctly ruled that agents, field patrolmen and

patrolmen, who were appointed, not elected officers of the NMU, were entitled to pensions under the Officers' Pension Plan. As the district court found, eligibility for payments under the pension plan depended not on whether the persons in question were elected or non-elected but on whether they were officers or only employees. Under the NMU constitution patrolmen, field patrolmen and agents were clearly designated as officers, though by virtue of amendments to the constitution some of these officers were at some times appointed rather than elected.

The plaintiffs contend that on the prior appeal this court interpreted the NMU constitution to deny coverage to non-elected officers. That issue was not before us on the previous appeal and we did not decide it one way or the other. There is nothing in our prior opinion which prevents our accepting the ruling of the district court which seems to us to be correct.

II.

The district court held that none of the three trustees was liable for the payments to Brauch, and that Segal and Karchmer could not be surcharged for the payments to Perry, but that Freedman should be so surcharged.

A. Surcharge of Karchmer and Segal.

The district court correctly held that the exculpatory provisions of the 1952 Trust Agreement exonerated the trustees except for wilful misconduct and that Karchmer and Segal were not involved in any wilful misconduct in their actions concerning these payments.

The 1952 Trust Agreement provided, in relevant part:

> "4. The Trustee shall not be liable for the making, retention, or sale of any investment or reinvestment as made by them, as herein provided, nor for any

loss to, or diminution of the Fund, *except due to their own wilful misconduct.*"

"5. The Trustees shall be protected in acting upon any paper or document believed by them to be genuine and to have been made, executed, or delivered by the proper party purporting to have made, executed or delivered the same, and shall be protected in relying and acting upon the opinion of legal counsel (including opinion of legal counsel who is or may be a trustee hereunder) in connection with any matter pertaining to the administration or execution of this Trust Fund. *No Trustee shall be liable for any action taken or omitted by him unless such act or omission is the result of wilful misconduct, nor for the acts of any agent, employee, or attorney selected by the Trustees with reasonable care, nor for any act or omission of any other Trustee.*" (Emphasis added.)

The plaintiffs, arguing that the amendments to the trust agreement "in effect creat[ed] new trusts . . .", contend that the effective date of the trust agreement was not 1952, but October 28, 1961 and September 28, 1964, the dates of the amendments. This point has significance because between 1952 and 1961 Section 501(a) of the LMRDA became law. That section reads:

> "A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy."

Thus, according to plaintiffs, Section 501(a) invalidates the trustee exculpatory clause, at least as it applies in this case.

There is no reason to treat the amendments of 1961 and 1964 as anything other than they purported to be,—that is amendments to the basic agreement which otherwise remained in full force and effect. The amendments made no change whatsoever in the original agreement as far as the exculpatory clause of that agreement is concerned.

Moreover, even if the effective date of the agreement were held to be subsequent to the enactment of Section 501(a), the plaintiffs could not prevail. The ban of Section 501(a) against all "general exculpatory provisions by a labor organization in its constitution, by-laws or resolutions" does not apply to a standard trustee exculpatory clause of a trust agreement. Neither the express language, the legislative history of the section or the purpose of the section indicate the desire of Congress to include trustee exculpatory provisions within the general ban on exculpatory provisions. The language of the section is clearly aimed at union officers, not trustees; nor can a trust be equated with "a labor organization." The purpose of Congress in enacting Section 501(a) supports this literal interpretation of the provision. The section was aimed at stopping the pilfering of union funds by union officers, not at the conduct of trustees acting in their capacity as fiduciaries.

B. Surcharge of Freedman

The district court found that Freedman showed a "reckless indifference" to his duty as a trustee and therefore should be surcharged for the lump sum pension paid to Perry. The facts as shown in the record amply support this finding.

Freedman's opinion letter of January 16, 1969, stated that Perry was "entitled to credit for covered employment for the period through October 20, 1974 based on his contract with NMU, pursuant to which 'contributions

have been made by the Union to the Plan for the period through October 20, 1974,' and that Perry was 'entitled to receive immediate payment.' " *Morrissey v. Curran*, 351 F. Supp. 775, 783 (1972). As the district court noted, "This was wrong, on both counts." In the first place, prepayment of contributions is not authorized by the trust agreement, which contains the only provision authorizing payments to the fund. Second, there was absolutely no basis for Freedman's conclusion that the payment of the lump sum to Perry could be made immediately. It is entirely clear "that the pension was payable on October 20, 1974, and then only if the trustees at that time exercised their discretion under Article V, Section 8 to pay Perry a lump sum."

These are not complex legal questions on which reasonable men could disagree. Freedman's 1969 legal opinion constituted gross error and warranted the conclusion of the district court that he had acted in reckless disregard of his duty as a trustee.

III.

A. Liability of Curran and Wall for payments to the Pension Fund

The evidence in the record shows that Curran and Wall acted in good faith, relying on the advice of the union's general counsel. In a matter such as this in which the issue is reasonably open to legal dispute an officer acting in good faith is justified in relying on counsel and is not liable, if he so acts, for breach of trust.

B. Payments by the Pension Fund

The district court said there "is no evidence that on January 16th Curran directed the payment to Perry of $222,200 or directed Freedman to furnish the legal opinion

to the trustees. Consequently, on the evidence presented, plaintiffs have failed to prove that Curran breached his fiduciary duty under LMRDA." *Morrissey v. Curran, supra,* at 785.

Plaintiffs now argue that Curran dominated the trustees and it was through this power that the payment to Perry was made. This is properly a factual question for the district court which ruled on the basis of all the evidence presented that the plaintiffs failed to prove their contention. There is no reason for believing that the ruling of the district court on this question was clearly erroneous.

The district court held that the evidence established that Wall played no part in the events of January 16th, and the payment to Perry. There is nothing in the record to indicate that that ruling is incorrect.

C. Liability of Curran and Wall for payments to Shapiro as Trustee

Plaintiffs contend that Curran and Wall are liable for any payments made to Shapiro as trustee. In February, 1972, after the ruling of this Court, the union deposited $460,363 in a bank account under union control. This money was part of the funds paid by the trustees to the NMU to comply with the court order. The union estimated that this was the amount necessary to fund the pensions for current employees. A trust agreement was drawn up, and Shapiro was named as trustee. Plaintiffs now attack this action.

Plaintiffs' contentions fail for several reasons. First, the union never paid the money to Shapiro; the trust agreement was never executed. Even if the money had been paid, the proposed pension plan for current employees was for future payments. Consequently, the establishment of the fund was permissible and not prohibited by this court's prior decision.

IV.

The district court awarded counsel fees, accountants' fees and expenses to plaintiffs in the amount of $111,864.00, and directed that this amount be paid out of the judgment recovered by the union. This is the correct approach; the union, not the pension fund should shoulder these costs. The fees requested are adequate but not excessive.

Affirmed.

AGREEMENT BETWEEN NATIONAL MARITIME UNION AND PERRY.

AGREEMENT made this 2d day of August, 1966, and between the NATIONAL MARITIME UNION OF AMERICA, AFL-CIO (hereinafter referred to as the "NMU"), and WILLIAM PERRY (hereinafter referred to as "Perry").

WHEREAS, Perry has been employed by NMU in the capacity of Assistant to the President since the day of , 1958, pursuant to Article 13, Section 1(f) of the Constitution of the National Maritime Union of America, AFL-CIO; and

WHEREAS, Perry has been of invaluable service to the President of the NMU in the performance of his vast responsibilities and important duties in the conduct of the union activities, and Perry also has been of great assistance to all the National Officers in assisting them in their duties and in otherwise performing important duties on behalf of NMU; and

WHEREAS, the NMU, its President and the National Officers desire that Perry continue to serve as Assistant to the President of NMU, as an inducement to him to continue to serve in this capacity and intending to be legally bound hereby, it is mutually agreed by and between the parties as follows:

1. The parties hereby agree that Perry shall continue in the employ of NMU to serve as Assistant to the President of NMU until October 20, 1974. Upon the expiration of said original term, said employment shall continue thereafter under the same terms for successive additional terms of four (4) years each, unless either party notifies the other in writing, at least six (6) months prior to the expiration

of any term of this Agreement, of intent to terminate said Agreement, at the end of the then current term. In absence of such notice, this Agreement shall continue from four years to four years until so terminated.

2. Perry's compensation during the term of this Agreement, or any renewal or extension thereof, shall be the same as the compensation paid to him as of July 1, 1966, including all contributions to the NMU Officers Pension Plan and any insurance or other fringe benefits presently available or payable, or which may become payable or available in the future to the NMU National Officers during the term of this Agreement or renewal or extension thereof. The rights, compensation and benefits conferred hereunder shall be in addition to those presently and hereafter enjoyed by and accruing to Perry (including but not limited to severance pay and pension benefits, inter alia), and shall not be deemed to take away, change, diminish or limit any of same in any manner.

3. In the event that this Agreement or Perry's employment should be terminated, with or without cause, prior to the expiration date hereof or of any renewal or extension, or in the event that Perry should become incapacitated from performing his duties, either totally or partially, by reason of illness, injury, physical incapacity or any other cause, Perry shall be entitled to continue to receive his said salary in full, including contributions to the NMU Officers Pension Plan and any other fringe benefits payable to the National Officers as under paragraph 2 hereof, during the balance of the term hereof or any renewal or extension. In the event, however, of such termination, or if such incapacity should be substantial or total, Perry shall have the option to demand and receive at one time or over any period that he shall specify an amount equal

to the said total salary, including contributions to the NMU Officers Pension Plan and any other fringe benefits payable to National Officers which he would have received during the balance of the original term or any renewal or extension hereof.

4. For the purposes of determining Perry's entitlement to participation in and benefits from, the NMU Officers Pension Plan, the parties recognize, understand and agree that Perry shall be deemed to be a "Participant" in "Covered Employment" (as defined in the said Plan) during the full period of the original term of this Agreement, and the full four-year period of each renewal or extension thereof, notwithstanding anything to the contrary contained in paragraph 3 or any other provision of this Agreement.

5. This Agreement and all the terms and conditions hereof shall be binding upon the parties, and their heirs, beneficiaries, representatives, successors and assigns.

IN WITNESS WHEREOF, the parties have hereunto duly executed this Agreement the day and year first above written.

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO

By JOSEPH CURRAN,
Joseph Curran,
President

WILLIAM PERRY
William Perry

SHANNON WALL,
Shannon Wall,
Secretary-Treasurer

MEL BARISIC,
Mel Barisic,
Vice-President

RICK MILLER,
Rick Miller,
Vice-President

JAMES J. MARTIN,
James Martin,
Vice-President

ROBERT NESBITT,
Robert Nesbitt,
National Representative

PETER BOCKER,
Peter Bocker,
National Representative

LEO STRASSMAN,
Leo Strassman,
National Representative

Intending to be legally bound hereby and in consideration of the reliance hereto by the parties to the foregoing Agreement, we hereby acknowledge and agree that paragraph 4 of the said Agreement shall be binding upon us and our successors in determining William Perry's entitlement to participation in, and benefits from, the NMU Officers Pension Plan.

ABRAHAM E. FREEDMAN,
Abraham E. Freedman,

MARTIN E. SEGAL,
Martin E. Segal,

LEON KARCHMER,
Leon Karchmer,

Trustees, National Maritime Union Officers Pension Plan.

AGREEMENT AND DECLARATION OF TRUST BETWEEN NATIONAL MARITIME UNION AND COOPER, ET AL.

AGREEMENT AND DECLARATION OF TRUST first dated as of December 29, 1952 and revised this 28th day of October 1961, by and between the NATIONAL MARITIME UNION OF AMERICA, AFL-CIO (hereinafter referred to as the "Union"), and HERMAN E. COOPER, MARTIN E. SEGAL and LEON KARCHMER (hereinafter referred to as the "Trustee"), as Trustees under this Agreement and Declaration of Trust.

WITNESSETH:

WHEREAS, the National Maritime Union of America, AFL-CIO, by agreement with Herman E. Cooper, Martin E. Segal and Leon Karchmer, dated as of December 29, 1952, established a trust fund for the exclusive benefit of its elected officials through payments, upon the terms, and subject to the conditions and limitations therein set forth; and

WHEREAS, by custom, practice and usage the term "elected official" has historically been deemed to include officials duly appointed in accordance with the Union's constitutional procedures; and

WHEREAS, said fund has continuously been administered by the Trustees from the date of its establishment and is presently being so administered; and

WHEREAS, the Union desires to extend the benefits contemplated by the aforesaid Agreement to those of its employees who represent the Union in the conduct of its business (commonly referred to as "Representatives") and to those of its employees who are engaged in supervisory or professional activities, none of whom is repre-

sented by another labor organization for purposes of collective bargaining; and

WHEREAS, the Union desires to amend and revise the aforesaid Agreement to reflect the foregoing understandings and purposes, effective as of December 29, 1952; and

WHEREAS, the Trustees have declared and do hereby declare that they will receive, hold, administer and dispose of all money and securities paid, transferred, or delivered to them as Trustees, pursuant to the provisions of this Agreement and Declaration of Trust, with the duties and powers and for the uses and purposes herein set forth, and none other;

NOW, THEREFORE, in consideration of the premises, it is mutually agreed between the parties that the aforesaid Agreement be and the same hereby is amended and revised, effective as of December 29, 1952, as follows:

I. DEFINITIONS.

Wherever used in this Agreement and Declaration of Trust:

1. "Agreement" means this Agreement and Declaration of Trust.
2. "Union" means the National Maritime Union of America, AFL-CIO.
3. "Trustees" means the Trustees designated herein, as well as their successors designated in the manner herein provided.
4. "Fund" means all moneys and property paid to the Trustees and all securities purchased by the Trustees, pursuant to the provisions of this Agreement, together with all interest or other income thereon, and the net proceeds of any sale or other disposition of such securities.

5. "Plan" means the Pension Plan adopted by the Trustees, pursuant to the terms of this Agreement.
6. "Official" or "Officer" means a person holding any of the following offices, in accordance with the provisions of the Union constitution:
   a) National President
   b) National Secretary
   c) National Treasurer
   d) National Vice-President
   e) National Representative
   f) National Port Committee Member
   g) Branch Agent
   h) Field Patrolman
   i) Patrolman
7. "Representative" means any person, other than an elected National Representative referred to in Section 6 of this Article, who is employed by the Union in the capacity of "Assistant to the President" or "Organizer."
8. Employees engaged in "supervisory or professional activities" means the following employees of the Union: "Maintenance Supervisor", "Bookkeeping Supervisor", "Records and Supplies Supervisor", "Executive Secretary", "Publicity Director and Editor of The Pilot."
9. "Participant" means an Officer, Union Representative, or any employee who is engaged in a supervisory or professional activity.

II. Source of Assets of the Fund.

1. In consideration of this Agreement and upon its execution, the Union has made an initial payment of $80,000.00 to the Trustees.

2. Commencing with the calendar quarter of January 1, 1953 to March 31, 1953, and for each calendar quarter thereafter, the Union has been making payments to the Trustees a sum of money equal to 23% of the compensation paid by the Union to the participants for the calendar quarters then ending. The Union agrees to continue making such payments in the same manner as heretofore, i.e., within ten days after the end of each calendar quarter.

III. THE TRUSTEES.

A. *Terms of Office and Successors.*

1. The Trustees designated herein shall continue to serve as Trustees for life, unless they or any one of them resign or become incapable of discharging their duties as Trustees. A resignation must be submitted in writing to the President of the Union and the question of a Trustee's incapacity to discharge his duties shall be conclusively determined by the other Trustees.

2. In the event of a vacancy created by the death, resignation or incapacity of one of the Trustees, the remaining two Trustees shall immediately meet and designate a successor Trustee, who shall serve for the same term and upon the same terms and conditions as his predecessor. In the event that the remaining Trustees are unable to designate a successor Trustee, such designation shall be made by a majority vote of the National Officers of the Union.

3. During the interim period prior to the designation of a successor Trustee, the remaining Trustees acting in the manner herein provided, shall administer the affairs of this trust fund.

B. *Meetings and Voting.*

1. Decisions of the Trustees shall be made by the concurring vote of the majority of the Trustees. The vote of the Trustees may be cast by them in person at a meeting, or may be evidenced by a written instrument signed by them, or telegrams from a requisite number of Trustees, after written notice to all of the Trustees of the question to be decided.

2. Any Trustee may call a meeting of the Trustees at any time by giving written notice not less than forty-eight hours in advance of the time and place thereof to each Trustee. Meetings of the Trustees may also be held at any time without notice if all the Trustees consent thereto.

3. A majority of the Trustees, present in person at any meeting, shall constitute a quorum for the transaction of business.

C. *Powers and Duties.*

1. The Trustees shall continue to administer the Pension Plan, heretofore adopted by them on February 16, 1953, pursuant to this Agreement and Declaration of Trust. Consistent with the purposes of this Agreement the Trustees shall have full and sole discretion to determine the amount and nature of such benefits and the terms and conditions of payment and shall have the power to conclusively determine all questions concerning the payment of benefits to any individual recipient or proposed recipient.

2. The Trustees shall deposit all moneys received by them in such bank or banks as they may designate for that purpose and in such manner as the Trustees, in their sole discretion, shall determine. The Trustees shall invest and reinvest such moneys as in their sole discretion they may determine are not required for current expenditure in any securities and without distinction between principal and

income. The Trustees, in their discretion, may keep such portion of the Fund in cash or cash balances as the Trustees may, from time to time, deem to be in the best interests of the Fund.

3. The Trustees are authorized and empowered:

a) To sell, exchange, convey, transfer, or otherwise dispose of any property held by them by private contract or at public auction.

b) To make, execute, acknowledge, and deliver any and all documents of transfer and conveyance and any and all instruments that may be necessary or appropriate to carry out the powers herein granted.

c) To register any investment held in the Fund in their own names or in the name of a nominee and to hold any investment in bearer form, but the books and records of the Trustees shall at all times show that all such investments are part of the Fund.

4. The Trustees shall not be liable for the making, retention, or sale of any investment or reinvestment as made by them, as herein provided, nor for any loss to, or diminution of the Fund, except due to their own wilful misconduct.

5. The Trustees shall be protected in acting upon any paper or document believed by them to be genuine and to have been made, executed, or delivered by the proper party purporting to have made, executed or delivered the same, and shall be protected in relying and acting upon the opinion of legal counsel (including opinion of legal counsel who is or may be a trustee hereunder) in connection with any matter pertaining to the administration or execution of this Trust Fund. No Trustee shall be liable for any action taken

or omitted by him unless such act or omission is the result of wilful misconduct, nor for the acts of any agent, employee, or attorney selected by the Trustees with reasonable care, nor for any act or omission of any other Trustee.

6. No party dealing with the Trustees in relation of this Trust Fund shall be obliged to see to the application of any money or property of the Trust Fund; or to see that the terms of this Trust Fund have been complied with, or be obliged to inquire into the necessity or expediency of any act of the Trustees, and every instrument executed by the Trustees shall be conclusive in favor of every person relying thereon: (a) that at the time of delivery of said instrument the Trust Fund hereby created was in full force and effect, (b) that said instrument was executed in accordance with the terms and conditions contained in this Agreement, and (c) that the Trustees were duly authorized and empowered to execute such instrument.

7. The receipt given by the Trustees for any money or other property received by them shall effectually discharge the person or persons paying or transferring the same, and such person or persons shall not be bound to see to the application, or be answerable for the loss or misapplication thereof.

8. The Trustees may deduct from and charge against the Trust Fund any taxes paid by them, which may be imposed upon the Trust Fund, the income, property, or transfer thereof, or of any part thereof, or upon or with respect to the interest of any individual therein, which the Trustees are required to pay. The Trustees, in their discretion, may contest the validity or amount of any tax, assessment, claim or demand which may be levied or made against, or in respect of the Trust Fund, or against or in respect of any part of the Trust Fund, the income, property or transfer thereof, or in any matter or thing connected therewith.

9. The Trustees shall be empowered to obtain and determine compensation for legal counsel, accounting, technical, actuarial and investment services and such administrative assistance as they may, in their discretion find necessary. If any Trustee shall have a financial interest in a firm whose services are desired by the Fund, that Trustee shall not participate in discussions or decisions relating to the retention of such firm or the terms and conditions of compensation for the services to be rendered.

10. The Trustees may delegate any of their ministerial powers and duties hereunder to one or more of the Trustees or to one or more officers of the Union designated by them for that purpose.

11. In the event of any ambiguity, the Trustees shall have the power to construe this Agreement and Declaration of Trust, and their construction of the same shall be final and conclusive.

12. The Trustees shall have all other powers necessary and proper to the carrying out of the purposes of the Trust.

IV. The Union.

1. The Union shall promptly pay to the Trustees the contributions due, in accordance with the provisions of this Agreement, or of the Pension Plan adopted pursuant to this Agreement, or, if the Trustees so direct, to deposit such contributions in such depository as the Trustees shall designate.

2. The Union shall provide the Trustees with all records and information requested by the Trustees and designated by the Trustees as being necessary to the performance of their duties.

3. Liability for the payment of the pensions and benefits provided for under the Pension Plan adopted pursuant to the within Agreement and Declaration of Trust and any other liability arising under or out of this Agreement shall be limited exclusively to the assets of the Trust Fund, and in the event that such assets are at any time insufficient to provide for the payment of any pension or benefit payments due under the Pension Plan, or any other such liability, no liability for the payment thereof shall attach to or may be asserted against the Trustees.

V. Miscellaneous.

1. Notwithstanding anything to the contrary contained in this Agreement and Declaration of Trust, as now expressed or hereafter amended, it shall be impossible at any time for any part of the trust corpus or income to revert to the Union or to be used for or diverted to any purpose other than the exclusive benefit of the eligible participants and their beneficiaries, through the payments, upon the terms, and subject to the conditions and limitations contained in the Pension Plan adopted pursuant to this Agreement, or in the event of termination, in such manner as shall be designated by the Trustees.

2. No participant, or any individual claiming by, through, or under any participant, shall have any right, title or interest in or to or claim against the trust fund or any part thereof, except the right to receive pensions or benefits in the amounts and subject to the terms and conditions provided in the Pension Plan.

3. Neither the pension nor any other benefit under the Pension Plan, nor the assets in the individual account of a participant entitled to receive such pension or benefits shall be subject in any manner to anticipation, alienation,

sale, transfer, assignment, pledge, encumbrance or charge, and any attempt so to anticipate, alienate, sell, transfer, assign, pledge, encumber or charge the same shall be void; nor shall any such pension or other benefit or such assets be in any manner, whether by action of the participant or his beneficiary or by operation of law, liable for or subject to the debts, contracts, liabilities, engagements or torts of the person entitled to such pension or other benefit.

4. Every individual receiving or claiming a pension or other benefit under this Agreement and Declaration of Trust or Pension Plan enacted pursuant hereto, shall be conclusively presumed to have been competent until the date on which the Trustees shall have received written notice, in a form and manner acceptable to them, that such an individual is an incompetent or a minor, for whom a guardian or other person legally vested with the care of his person or estate shall have been appointed; provided, that the Trustees may, in their discretion, validly recognize actions by, and conduct transactions with, others acting, prior to the receipt of, or in the absence of such written notice, in behalf of an individual found by the Trustees to be an incompetent or a minor, if the Trustees shall find such actions or transactions to be in the best interests of such individual.

5. This agreement and the Trust Fund and Pension Plan established hereunder and pursuant hereto have been executed in the State of New York and all questions pertaining to the validity or construction of this instrument and of the acts or transactions of the parties hereto shall be determined in accordance with the laws of the State of New York.

6. In case any provisions of this Agreement shall be held illegal or invalid for any reason, said illegality or invalidity shall not affect the remaining parts of this Agreement, but this Agreement shall be construed and enforced as if said illegal and invalid provisions had never been inserted herein.

VI. TERMINATION.

1. The trust created by this Agreement and Declaration of Trust shall terminate: (a) When the Trustees, in their sole discretion, determine that the purposes of this Agreement can no longer be carried out; (b) Upon the affirmative vote of two-thirds of the membership of the Union, but in no event shall the trust be terminated by vote of the membership for a period of at least twenty years from the date of execution of this Agreement and Declaration of Trust.

2. If there shall be assets remaining in the Trust Fund upon the termination of this trust, such remaining assets shall be distributed and disposed of in such manner and upon such terms and conditions as the Trustees shall, in their sole discretion, determine.

VII. AMENDMENTS.

1. This Agreement and Declaration of Trust may be amended at any time by an instrument in writing, executed by the President of the Union and a majority of the Trustees.

VIII. NAME.

The fund established by this Agreement and Declaration of Trust shall be known as the "National Maritime Union Officers' Pension Fund", and the Trustees may conduct business under that name.

IN WITNESS WHEREOF, the Trustees and the National Maritime Union of America, AFL-CIO, by its duly authorized officers, have executed this Agreement and Declaration of Trust to evidence their acceptance of the trusts hereby created and their agreement to be bound thereby.

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

By JOSEPH CURRAN, National President,

STEVE FEDEROFF, National Secretary-Treasurer,

DAVID M. RAMOS, National Vice-President,

TRUSTEES:

HERMAN E. COOPER,

LEON KARCHMER,

MARTIN E. SEGAL.

ad